(3) The Senior Inspector of Mines, Perak, do renew or extend the hydraulic licence in relation to the said land in the name of the plaintiffs for a period of one year from the date when security as hereinbefore ordered has been furnished.

(4) The Order made herein on October 22, 1974, be discharged.

(5) The defendant's Motion dated March 21, 1974, be dismissed.

(6) The defendant or an authorised representative to be at liberty to enter on the said land for the purposes of inspection and otherwise in accordance with the terms of the Permit to Mine dated March 6, 1973, or to station an authorised representative on the said land to observe and ensure due compliance with the terms of the Permit to Mine.

(7) Liberty to both parties to apply generally.

(8) The costs of and incidental to both applications to be costs in the cause.

Order accordingly.

Solicitors: *Concison, Lai & Clark; J. R. Devadas.*

SYARIKAT NIP KUI CHEONG TIMBER CONTRACTOR v. SAFETY LIFE AND GENERAL INSURANCE CO. SDN. BHD.

[O.C.J. (Hashim Yeop A. Sani J.) February 22, 1975]
[Kuala Lumpur — Civil Suit No. 1020 of 1974]

Practice and Procedure — Plaintiffs' partnership firm having place of business in Sabah — Whether they can sue in Peninsular Malaysia in firm's name — Carrying on business within jurisdiction — R.S.C. 1957, O.48A r.1 — Courts of Judicature Act, 1964, ss. 3, 4 and 7(2) — Federal Constitution, art. 121.

Order 48A rule 1 of the Rules of the Supreme Court provides in effect that two or more persons claiming as co-partners and carrying on business within the jurisdiction may sue in the name of the firm. The question that arose in this case was whether the plaintiffs who have their place of business in Tawau, Sabah, can sue in Peninsular Malaysia as a firm.

Held: the High Court in Malaya and the High Court in Borneo have separate and distinct territorial jurisdictions, and therefore the plaintiffs could not avail themselves of Order 48A rule 1 of the Rules of the Supreme Court but should sue in the name of the co-partners.

Cases referred to:-

(1) *Noble Lowndes & Partners (a firm)* v. *Hadfields Ltd.* [1939] Ch. 569, 572.

(2) *Chong Thye Pin* v. *Lewis Lazarus & Sons* [1932] M.L.J. 73.

CIVIL SUIT.

R. Manickam for the plaintiffs.

Sri Ram for the defendants.

Hashim Yeop A. Sani J.: This is an application way of Notice of Motion by the defendants seeking for an order that the Specially Indorsed Writ of Summons dated August 23, 1974 be set aside for being in non-compliance of Order 48A Rule 1 of the Rules of the Supreme Court, 1957. Plaintiffs are a firm of contractors having their place of business in Tawau, Sabah, and the defendants are an insurance company having their registered office in Kuala Lumpur.

On August 23, 1974 plaintiffs, suing as a firm, caused to be issued a Specially Indorsed Writ against the defendants claiming *inter-alia* a sum of $26,000 and consequential reliefs. The writ was served on the defendants and the defendants entered conditional appearance and gave notice of same to the plaintiffs' solicitors.

In this Motion the sole preliminary issue is whether on the construction of Order 48A Rule 1 of the Rules of the Supreme Court, 1957 plaintiffs as a firm *have* capacity to sue in the name of the firm. For ease of reference Order 48A Rule 1 is reproduced below:—

"1. Any two or more persons claiming or being liable as co-partners and *carrying on business within the jurisdiction* may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action; and any party to an action may in such case apply by summons to a judge for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, co-partners in any such firm to be furnished in such manner, and verified on oath or otherwise as the judge may direct." (The italics are mine).

It is obvious, as the marginal note to the order says, that Order 48A Rule 1 deals with actions by and against a firm within jurisdiction. This order enables persons carrying on business in partnership to sue or be sued in the firm's name. But this is a rule made for convenience, and an action by or against a firm notwithstanding this rule remains an action by or against the individual members of the firm — *per* Farwell J. in *Noble Lowndes & Partners (a Firm)* v. *Hadfields Ltd.*[1] at page 572.

Carrying on business within jurisdiction is explained in *Mallal's* Supreme Court Practice at page 649 as follows: —

"Carrying on Business within the Jurisdiction. — There is a well-known rule that if a firm has no place of business in this country held in the name of the firm then they do not carry on business within the jurisdiction even though they employ an agent locally. *Chung Thye Phin* v. *Lewis Lazarus & Sons* [1932] M.L.J. 73; [1932] S.S.L.R. 129. As 'a firm' within this rule is a firm carrying on business within the jurisdiction, the issue of a writ in the name of a foreign firm will be refused unless the names of all the partners are given. It makes no difference whether the partners are within or outside the jurisdiction. The question is 'does the firm there carry on business?' If the firm has no place of business within the jurisdiction they do not carry on business here, even though the partners come to the Federation or Singapore regularly and employ an agent to purchase goods to be sent to the firm abroad. Nor does the employment of the agent who procures orders on commission, but has no power to accept or reject such orders, constitute 'carrying on business in the Federation or Singapore', although the name of the firm is on the door of his office. See *Grant* v. *Anderson* [1892] 1 Q.B. 108, C.A.; *Worcester City and County Banking Co.* v. *Firbank Pauling Co.* [1894] 1 Q.B. 784, C.A."

It is also an established rule that the onus is on the party to show that the firm is carrying on business within jurisdiction. In this case the Statement of Claim itself admits that the plaintiffs are carrying on business in Tawau, Sabah.

Chung Thye Phin v. *Lewis Lazarus & Sons*[2] is a straightforward case of jurisdiction in the territorial sense because at the time of accrual of cause of action in that case the foreign firm had no place of business within the Colony of Singapore. The relevant provision of the Singapore Civil Procedure Code then had, in my view, exactly the same effect as the first limb of our Order 48A Rule 1 for the former read:—

"Any two or more persons, claiming or being liable as co-partners, and carrying on business within the jurisdiction, may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action."

Prichard J. in his judgment in *Chung Thye Phin's* case states: —

"There is a well-known rule that if a firm has no place of business in this country held in the name of the firm then they do not carry on business within the jurisdiction even though they employ an agent locally .... Therefore, the writ in this case has been improperly issued and must be set aside."

After Malaysia Day, a peculiar set up was established in respect of the judicial powers of the Federation. Article 121 of the Federal Constitution and the Courts of Judicature Act, 1964 set out the jurisdiction of the High Courts. The question is what is meant by "jurisdiction" in the context of the Constitution and the Courts of Judicature Act, 1964? Counsel for the plaintiffs seeks to rely on the purported interplay of the definitions of "High Court" and "local jurisdiction" and section 7(2) of the 1964 Act. Section 3 of the Courts of Judicature Act, 1964 defines "High Court" to mean "the High Court in Malaya *and* the High Court in Borneo *or* either of them, as the case may require." The definition of "local jurisdiction" sets out the *territorial* jurisdiction of the High Court in Malaya and the High Court in Borneo. Section 7(2) of that Act privides that all writs, summonses, warrants, orders, rules, notiues and other processes whatsoever, whether civil or criminal, issued or made by or by the authority of the court respecting any cause or matter within its jurisdiction shall have full force and effect and may be served or executed *anywhere within Malaysia.*

According to counsel for the plaintiffs a distinction must be drawn between the meaning of "jurisdiction" and "local jurisdiction" in the 1964 Act. If I get him right, I think what he means is simply this: that where the word "jurisdiction" is used it means the whole of the jurisdiction of both the High Court in Malaya and the High Court in Borneo, that is to say the whole of Malaysia, purporting to rely on the definitions of "High Court" and "local jurisdiction" in section 3 of the Courts of Judicature Act, 1964. But in my view that would be unduly stretching the meaning of "jurisdiction" in Order 48A Rule 1 of the Rules of the Supreme Court, 1957. There is no doubt at all that what Order 48A Rule 1 speaks about is territorial jurisdiction and it is all too clear that both the High Court in Malaya and the High Court in Borneo have separate and distinctive territorial jurisdiction. Article 121(1) of the Constitution speaks of the two High Courts having "co-ordinate jurisdiction" and the definition of "local jurisdiction" in the Courts of Judicature Act, 1964 speaks of the territorial jurisdiction of each of the two High Courts. Section 7(2) of the 1964 Act should not be misconstrued for what that subsection does is simply to get around the provision of Order 11 Rule 1 of the Rules of the Supreme Court, 1957 for convenience for otherwise unnecessary difficulties will arise in the process of the courts *within* Malaysia. The enactment of section 7(2) of the 1964 Act itself would strengthen the argument that the framers of the 1964 Act recognised the distinctive territorial jurisdiction of the two High Courts in Malaysia. I do not believe and there is nothing to suggest that that subsection attempts also to do away with Order 48A Rule 1 either expressly or by necessary implication.

For the above reasons the Specially Indorsed Writ of Summons dated August 23, 1974 is set aside. The plaintiffs shall be at liberty to sue in the names of the co-partners. The cost of this application shall be borne by the plaintiffs.

Order accordingly.

Solicitors: *Sri Ram, Chan & Chia: Shook Lin & Bok.*